No. 22638

In The

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

REX SCHEPP, et ux,

Appellants,

v.

ELLEN LANGMADE, et al,

Appellees.

On Appeal from the United States District Court

For the District of Arizona

BRIEF FOR APPELLEES

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ATTORNEYS FOR APPELLEES

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BRIEF FOR APPELLEES

II.

SUMMARY OF THE ARGUMENT

1. The granting or denial of an application to amend is within the discretion of the trial judge, whose ruling will not be disturbed unless there has been an abuse of discretion.

2. The statute of frauds must be pleaded affirmatively.

3. Defendants should not be allowed to amend their answer after trial so as to set up a defense of the statute of frauds, in addition to that pleaded by their answer.

4. The price for which Schepp sold the Class A stock is determinative of its value in this litigation.

5. Rule 60 is not intended to provide relief for error on the part of the court, or to afford a substitute for appeal.

6. A motion to vacate judgment under Rule 60 is addressed to the sound discretion of the District Court and will not be disturbed on appeal except for abuse of discretion.

7. Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

8. Waiver of trial by jury, by the attorney for a party, binds the party as effectively as if he had effected the waiver by his own action.

III.

THE ARGUMENT

1. The Granting or Denial of an Application to Amend is Within the Discretion of the Trial Judge, Whose Ruling Will Not be Disturbed Unless There Has Been an Abuse of Discretion.

The above statement is supported by the decisions of this court in:

Wittmayer v. United States (9th Cir.)
118 F.2d 808, 809

American National Insurance Company v. Yee Lin Shee (9th Cir.) 104 F.2d 688, 695

2. The Statute of Frauds Must be Pleaded Affirmatively.

Rule 8(d) of the Arizona Rules of Civil Procedure [which is a rescript of Rule 8(c) of the Federal Rules of Civil Procedure] reads, so far as here material:

> "* * * in pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of frauds * * *"

The Arizona Supreme Court has definitely held that one relying upon the statute of frauds as a defense, must plead the same affirmatively.

Mallamo v. Hartman,
70 Ariz. 294, 219 P.2d 1039, 1041;
70 Ariz. 420, 222 P.2d 797

The same rule appears to have been followed in *Piest v. Tide Water Oil Company* (D.C. N.Y.) 41 F. Supp. 299.

3. Defendants Should Not be Allowed to Amend Their Answer After Trial so as to Set up a Defense of the Statute of Frauds, in Addition to that Pleaded by Their Answer.

The above statement appears to find support in:

Gaines W. Harrison & Sons v. J. I. Case Co. (D.C. S.C.) 180 F. Supp. 243

Throughout their argument appellants state, in effect, they did not plead the statute of frauds by their answer, and that the court's refusal to permit them to amend after trial, constituted prejudicial error.

By paragraph XIII of their answer to appellees' amended complaint, the appellants allege:

> "Allege that there is no written memorandum whereby said REX SCHEPP agreed to deliver the six hundred (600) shares surrendered by the late Stephen W. Langmade as alleged in plaintiffs' Complaint, and that the value of such shares exceed the sum of Five Hundred Dollars ($500.00)."
> (TR 29)

They now complain because the trial court refused them permission to amend their answer by alleging in substance the same thing they had affirmatively alleged in their original answer. Their motion in that respect is found at pages 50 to 51 of the transcript of record. They complain that the refusal of the trial court to allow such amendment prevented their defense based upon the statute of frauds. To appellees, it seems that had the court granted their motion to so amend, the legal effect of their answer, if so amended, would be the same as that set forth in their original pleading.

Just what appellants expect to accomplish by their suggested amendment, in view of the agreed statement of facts upon which the action was largely tried, does not appear too clear.

4. The Price for Which Schepp Sold the Class A Stock is Determinative of its Value in This Litigation.

Appellees concede that Langmade authorized sale of the Class A Stock at $20.00 per share. It is equally true Schepp sold the stock for $30.00 per share but did not account for the Langmade stock. The trial court determined the value of the Langmade stock to be $30.00 per share.

Appellants now assert the trial court should have fixed the value of the Langmade stock at $20.00 per share instead of the $30.00 which Schepp received.

Appellants' contention is wholly without merit and is contrary to the decision of the Arizona Supreme Court in:

Mandl v. City of Phoenix,
47 Ariz. 351, 18 P.2d 271, 272

5. Rule 60 is Not Intended to Provide Relief for Error on the Part of the Court, or to Afford a Substitute for Appeal.

The above statement finds support in *Title v. United States* (9th Cir.) 263 F.2d 28.

6. A Motion to Vacate Judgment Under Rule 60 is Addressed to the Sound Discretion of the District Court and Will not be Disturbed on Appeal Except for Abuse of Discretion.

The foregoing statement is supported by two decisions of this court:

Kolstead v. United States (9th Cir.)
262 F.2d 839

Perrin v. Aluminum Company of America
(9th Cir.) 197 F.2d 254

7. Findings of Fact Shall Not be Set Aside Unless Clearly Erroneous and Due Regard Shall be Given to the Opportunity of the Trial Court to Judge the Credibility of the Witnesses.

Rule 52 of the Federal Rules of Civil Procedure reads, in part, as follows:

> "* * * findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses * * *"

The rule is discussed in *Glens Falls Indem. Co. v. United States ex rel. and to Use of Westinghouse Elec. Supply Co.* (9th Cir.) 229 F.2d 370.

8. Waiver of Trial by Jury, by the Attorney For a Party, Binds the Party as Effectively as if he had Made the Waiver by his Own Action.

It has been repeatedly held by state and federal courts that the actions of counsel, with respect to matters of trial, are to be treated as the actions of the client.

Avery v. Calument & Jerome Copper Company,
36 Ariz. 329, 284 Pac. 159

Coconino Pulp & Paper Company v. Marvin,
83 Ariz. 117, 317 P.2d 550

Irvin v. Dwight B. Heard Investment Company,
35 Ariz. 528, 281 Pac. 213

State v. Haley,
87 Ariz. 29, 347 P.2d 692

National Labor Relations Board v. Lewis
(9th Cir.) 249 F.2d 832, 838;
affirmed 357 U.S. 10,
78 S. Ct. 1029, 2 L. Ed.2d 1103

Graham v. Squier,
45 F. Supp. 253, 254; *affirmed upon*
other grounds 132 F.2d 681

Heckin v. First National Bank,
5 Ariz. App. 379, 427 P.2d 360, 366

Besides, there was no substantial issue of fact for determination by a jury. Other than the value of the Class A stock, practically all possible issues were determined by the agreed statement (TR 32-38).

Appellees have not seen fit to challenge the authority of their attorneys to execute, upon their behalf and binding upon them, such agreed statement of facts.

IV.

CONCLUSION

Upon the record in this cause now upon appeal, it is most respectfully insisted the judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES E. FLYNN and
ALLAN K. PERRY
Attorneys for Appellees

By /s/ Allan K. Perry

ALLAN K. PERRY

V.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Allan K. Perry

ALLAN K. PERRY